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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1945

## No. 578

THOMAS PAPER STOCK COMPANY, ET AL.,
PETITIONERS,

*vs.*

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

PETITION FOR CERTIORARI FILED NOVEMBER 3, 1945.

CERTIORARI GRANTED JANUARY 2, 1946.

# SUPREME COURT OF THE UNITED STATES

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[fol. A] [File endorsement omitted.]

[fol. 1]

**IN THE UNITED STATES EMERGENCY COURT OF APPEALS**

No. 232

THOMAS PAPER STOCK COMPANY, et al., Complainants,

vs.

CHESTER BOWLES, Price Administrator, Respondent

COMPLAINT UNDER SECTION 204(e)—Filed June 8, 1945

This complaint is filed under Section 204(e) of the Emergency Price Control Act of 1942 as amended. In conformity with Rule 11 of this Court, complainants specify:

(1) *The names and principal business address of the complainants:* Thomas Paper Stock Company, a corporation, and Alvin E. Sandroff (president of said Company), 860 West Evergreen Avenue, Chicago 22, Illinois.

(2) *The Regulation objected to and the effective date thereof:* Maximum Price Regulation No. 30, and more particularly Section 1347.14(d) thereof, effective November 27, 1942, 7 F. R. 9732.

(3) *The date on which leave was granted to file the complaint and the court granting the leave:* May 10, 1945, United States District Court, Northern District of Illinois, Eastern Division. (True copies of the application for such leave and the order of the court granting it are annexed hereto in the Appendix.)

[fol. 2] (4) *The manner in which complainants are subject to the regulation complained of:* Complainants for many years have purchased, sold and dealt in printers' unsorted wastepaper, the maximum price of which is purported to be established by Subsection (d) of Section 1347.14 of the Regulation. They also deal in various grades and classifications of wastepaper, the maximum prices of which are established by other provisions of the Regulation. During the period July 16 to September 11, 1943, the corporate

complainant; of which the individual complainant is president, sold unsorted wastepaper to consumers thereof.

(5) *The objections with respect to which leave to file the complaint was granted, which are intended to be relied upon in support of the complaint:*

1. Complainants say that Subsection (d) of Section 1347.14 of the Regulation was invalid and of no effect during the period July 16 to September 11, 1943. In its present form [1] Section 1347.14(d) reads:

> "The maximum prices for sales of unsorted wastepaper to any person shall not exceed the maximum price prescribed by this regulation for 'No. 1 mixed paper,' regardless of the grades and quantity of each grade contained in such unsorted wastepaper." [2]

*Facts in support of the objection:*

a. Prior to the Regulation, the price of unsorted wastepaper varied in relation to the materials con-

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[1] As amended December 28, 1943, 8 F. R. 17483.

[2] Complainants' objections to the Regulation apply directly to the version of Subsection (d) prior to its amendment on December 28, 1943. The former text was as follows: "*Maximum prices for unsorted wastepaper.*—Unsorted wastepaper, which contains two or more unsorted grades, shall not be subject to the maximum prices prescribed by this Maximum Price Regulation No. 30, in the event that such paper is sold to a purchaser who warrants in writing to the seller that he will not use such paper as a consumer thereof, but will sort and grade it for resale into (1) grades listed in this Maximum Price Regulation No. 30, or (2) specialty grades described in paragraph (c) of this § 1347.14, or (3) paper which does not constitute wastepaper, as defined in § 1347.11, and that he will sell such paper so sorted and graded at prices no higher than the maximum prices prescribed for such grades by this Maximum Price Regulation No. 30, or by any other applicable maximum price regulation or price schedule. If, however, such unsorted paper is sold to a consumer thereof, the price therefor shall not exceed the maximum price prescribed by this Maximum Price Regulation No. 30 for 'No. 1 mixed paper'."

tained in each lot thereof. Every lot of unsorted wastepaper is always of a different value from any [fol. 3] other lot of unsorted wastepaper. Complainants' business consists in large part in dealing in printers' unsorted wastepaper, which is made up of clippings of new paper from printers' cutting machines, and consists of unbleached and bleached sulphite and soda pulp, which, by reason of its high quality, is manufactured into book and bond paper. This type of unsorted wastepaper has always been distinguished from a lower grade of unsorted wastepaper obtained from office buildings, department stores, etc., which is used to manufacture box board and paper board.

b. Section 1347.14(d) of the Regulation fixes the maximum price for all types of unsorted wastepaper sold to a consumer in terms of a specification or standard, "No. 1 mixed paper". Prior to the Regulation, the specification or standard in question was not in general use in the wastepaper industry and it had not previously been promulgated and its use lawfully required by another Government agency.[3] Consequently,

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[3] In his supplementary statement of considerations to Maximum Price Regulation No. 30, issued September 11, 1943, the Administrator said:

"'In one respect, Maximum Price Regulation No. 30 may be deemed to effectuate a standardization not heretofore known in the industry. Section 1347.14(d) provides that the maximum price for unsorted paper sold to a consumer shall not exceed the maximum price prescribed by the regulation for 'No. 1 mixed paper.' This was not the practice in the industry prior to price control. Prior to price control, unsorted paper was rarely sold to a consumer, but whenever it was the price varied depending upon the materials contained in the lot of unsorted paper. Maximum Price Regulation No. 30 penalizes sellers upon their sales of unsorted paper to a consumer. This provision affects a very small percentage of the industry's total volume and is absolutely necessary in order to secure effective price control with respect to wastepaper.'"

[fol. 4] the Price Administrator was prohibited by Subsection (j) of Section 2 of the Emergency Price Control Act of 1942, known as the Taft Amendment, enacted on July 16, 1943,[4] from promulgating Section 1347.14(d) of the Regulation without first determining that no practicable alternative existed for securing effective price control with respect to unsorted waste-paper. The Price Administrator did not make such a determination until September 11, 1943.[5] Therefore, Section 1347.14(d) of the Regulation was by force of the Taft amendment invalid and ineffective between July 16, 1943, the date of enactment of that amend-

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[4] The subsection reads as follows:

"(j) Nothing in this Act shall be construed (1) as authorizing the elimination or any restriction of the use of trade and brand names; (2) as authorizing the Administrator to require the grade labeling of any commodity; (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency."

[5] On September 11, 1943, the Administrator issued supplementary Order No. 64 (8 F. R. 12554) by which he amended the preamble to MPR 30 by adding thereto the following sentence: "Insofar as this regulation uses specifications and standards which were not, prior to such use, in general use in the trade or industry affected, or insofar as their use was not lawfully required by another Government agency, the Administrator has determined, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to the commodities subject to this regulation."

ment, and September 11, 1943, the date of the Administrator's determination.

c. On December 17, 1943 the complainants were indicted in the United States District Court, Northern District of Illinois, Eastern Division, for alleged viola- [fols. 5-6] tions of Maximum Price Regulation No. 30. Said indictment is still pending, the present complaint being filed pursuant to leave granted by said Court upon application of complainants, as more fully appears in the Appendix hereof. On June 29, 1944 the Price Administrator instituted against the complainants, in the same Court, a civil action for treble damages and an injunction, which action is still pending. Both proceedings involve sales of unsorted wastepaper to consumers alleged to have been made between July 16 and September 11, 1943 at more than the maximum price fixed by Maximum Price Regulation No. 30.

(6) *The nature of the relief requested:* Complainants request that this Court enter its judgment determining and declaring Section 1347.14(d) of Maximum Price Regulation No. 30 to have been invalid during the period from July 16 1943 to September 11, 1943.

David L. Bazelon, Jack H. Oppenheim, Attorneys for Complainants. Address for Service: 231 South LaSalle Street, Room 963, Chicago 4, Illinois.

[fol. 7] APPENDIX TO COMPLAINT

True Copies of Application and Order

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 43 CR 735

UNITED STATES OF AMERICA, Plaintiff,

vs.

THOMAS PAPER STOCK COMPANY, a Corporation of the State of Illinois, and ALVIN E. SANDROFF, Defendants

APPLICATION FOR LEAVE TO FILE A COMPLAINT IN THE EMERGENCY COURT OF APPEALS—Filed April 13, 1945

Defendants, Thomas Paper Stock Company, a corporation, and Alvin E. Sandroff, by their attorneys, Gottlieb and Schwartz, David L. Bazelon and Jack H. Oppenheim, hereby apply to this court for leave to file in the Emergency Court of Appeals a complaint against Chester Bowles, Price Administrator, setting forth objections to the validity of the provisions of Maximum Price Regulation No. 30 which the defendants are alleged, in the indictment herein, to have [fol. 8] violated. In support of this application defendants represent unto the court the following:

1. This application is filed pursuant to the provisions of Section 204 (e)(1) of the Emergency Price Control Act, as amended by the Stabilization Extension Act of 1944.

2. On June 15, 1944, the defendants filed a protest with the Price Administrator, pursuant to the provisions of Section 203 of the Emergency Control Act, against Maximum Price Regulation No. 30, as applied to the sales of unsorted waste paper alleged in the indictment to have been made between July 16 and September 11, 1943 at more than the maximum price fixed by MPR 30. The protest was directed to Section 1347.14 (d) of the Regulation, upon two grounds. Both were based upon the fact that said section fixes the maximum price for unsorted waste paper in terms of a specification or standard, "No. 1 mixed paper", and that such provision is in violation of Subsection (j) of Section 2 of the Emergency Price Control Act of 1942, known

as the Taft amendment, which was enacted on July 16, 1943.

The first objection which was asserted by the defendants in their protest was that the Price Administrator was prohibited by the Taft amendment from establishing maximum prices by the use of a standard or specification in the absence of one of the two conditions described in clause (4) of Section 2 (j). The second objection asserted by defendants was that even if clause (3) of Section 2 (j) of the Taft amendment be construed as authorizing the Administrator to employ specifications or standards for the purpose of fixing maximum prices of a commodity when he determined that no practical alternative exists for securing effecting price control with respect thereto, the fact is that in the case of unsorted waste paper he did not make such a determination until September 11, 1943, and that consequently [fol. 9] Section 1347.14 (d) of MPR 30 was by force of the Taft amendment invalid and ineffective between July 16, 1943, the date of enactment of that amendment, and September 11, 1943, the date of the Administrator's determination.

3. On July 29, 1944, defendants' protest was denied by the Price Administrator.

4. On August 26, 1944, defendants, being aggrieved by the denial of their protest, filed a complaint in the Emergency Court of Appeals pursuant to the provisions of Section 204 (a) of the Emergency Price Control Act. Said cause was docketed as No. 159 and entitled "Thomas Paper Stock Company, *et al.* v. Chester Bowles, Price Administrator".

5. On November 30, 1944, said cause came on for hearing at a session of the Emergency Court of Appeals at Chicago, Illinois, and was then taken under advisement.

6. On March 27, 1945, said cause was decided by the Emergency Court of Appeals in an opinion written by Chief Judge Maris and concurred in by Judge Lindley. Judge Laws dissented in part. A printed copy of the court's decision is attached hereto, marked "Exhibit A". As to defendants' first objection in their protest, all three judges concluded that the Taft amendment did not invalidate Section 1347.14 (d) of MPR 30 merely because the specification or standard employed by that section had not

previously been used by the waste paper industry or required by another governmental agency. As to the defendants' second objection, Chief Judge Maris and Judge Lindley concluded that such objection was not presented to the Price Administrator in a protest filed in time to enable him to consider and act upon it. From this conclusion Judge Laws dissented, saying among other things:

> "I therefore, believe it important in principle to hold that this Court should now pass upon an objection [fol. 10] to the Regulation, which seems of great importance to complainants and which in my judgment they have presented in accordance with authority granted by the Emergency Price Control Act of 1942."

7. As appears above, defendants' second objection to the Regulation was not considered upon its merits by the Emergency Court of Appeals. In that connection, however, Chief Judge Maris said:

> "We may consider that objection upon its merits only if and when a complaint asserting it is filed under Section 204 (e) (1) with leave of the United States District Court for the Northern District of Illinois after the complainants satisfy that court that the objection is asserted in good faith and that there is reasonable and substantial excuse for the complainants' failure to present it in a protest filed before September 11, 1943. *In view of the doubt which has existed as to the timeliness of the presentation of this objection in the protest filed June 15, 1944 it is quite clear that the District Court would be abundantly justified in finding that the complainants have such an excuse.*" (Emphasis supplied.)

Judge Lindley, concurring, said:

> "Congress enacted the amendments, intending to assure one in the position of complainants a right to be heard; that if, previously, complainants had no forum where they could present their second objection, they now enjoy such a right, by virtue of Section 204 (e)(1) and that we have jurisdiction solely by way of the avenue of approach provided therein."

Judge Laws said:

> "It may and probably will develop that the District Court will certify for our consideration the question in the case at bar, which the Court refuses to decide in the present proceeding."

8. The complaint against the Administrator which defendants now apply for leave to file in the Emergency Court of Appeals, will set forth the objection to the validity of [fol. 11] the Regulation, the merits of which objection were not passed upon by the Emergency Court of Appeals in said cause No. 159. Defendants represent that said objection is made in good faith, and that the fact that it is made in good faith is fully and adequately shown by the serious consideration heretofore given it by the Emergency Court of Appeals, as appears from the language of the separate opinions of each of the three judges of said court. That there is reasonable and substantial excuse for defendants' failure to present such objection in a protest filed in accordance with Section 203 (a) of the Emergency Price Control Act appears from the opinion of Chief Judge Maris, in which he says:

> "*In view of the doubt which has existed as to the timeliness of the presentation of this objection in the protest filed June 15, 1944, it is quite clear that the District Court would be abundantly justified in finding that the complainants have such an excuse.*" (Emphasis supplied.)

9. Defendants show the following as cause for not having filed this application within thirty days after arraignment: Section 204 (e)(1) was added to the Emergency Price Control Act by the Stabilization Act of 1944, which became effective July 1, 1944, which was more than thirty days after the arraignment herein. On July 1, 1944, there was already pending before the Price Administrator the protest hereinabove referred to. Defendants had reasonable and substantial excuse for not filing such protest prior to June 15, 1944 because upon the return of the indictment defendants demurred thereto upon the ground that Section 1347.14 (d) of Maximum Price Regulation No. 30 was invalidated by the Taft amendment, and at the time of the filing of the said demurrer it had been held in *United States*

v. *Pepper Bros.*, 52 F. Supp. 393, that the defense of the Taft amendment could be raised in the United States Dis-[fol. 12] trict Court, without resort to the protest procedure then provided by the Act. When it was held on May 3, 1944 by the Circuit Court of Appeals for the Third Circuit in *United States* v. *Pepper Bros.*, 142 F. (2d) 340, that the defense of the Taft amendment could not be made in the United States District Court, defendants prepared a protest based upon the Taft amendment and filed the same on June 15, 1944. Under the decision of the Emergency Court of Appeals in *R. E. Schanzer, Inc.*, v. *Bowles*, 141 F. (2d) 262, defendants' protest of June 14, 1944 was timely. It was held in that case there was no time limitation fixed by the Act upon the filing of a protest based on grounds arising, as in this case, more than sixty days after the issuance of a regulation. The bar to defendants' protest which has been set up by the majority opinion of the Emergency Court of Appeals in said cause No. 159 is a bar of which they had no notice from the language of the Act, as is pointed out by Judge Laws in his dissenting opinion in said case.

Wherefore, defendants pray that the leave above sought may be granted; and further pray that the court shall stay the present proceeding (1) during the period in which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted; and (2) during the pendency of any judicial proceeding instituted by the defendants under Section 204 (e)(1) of the Emergency Control Act with respect to the provisions of MPR 30 objected to as invalid, and until the exipration of the time allowed in Section 204 for the taking of further proceedings with respect thereto.

Thomas Paper Stock Company and Alvin E. Sandroff, by Gottlieb and Schwartz, David L. Bazelon, Jack H. Oppenheim, Their Attorneys.

[fol. 13] EXHIBIT A

Attached to application is a true copy of the printed opinion of the Emergency Court of Appeals in case No. 159.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 43 CR 735

UNITED STATES OF AMERICA, Plaintiff,

vs.

THOMAS PAPER STOCK COMPANY, a Corporation of the State of Illinois, and ALVIN E. SANDROFF, Defendants

ORDER—Entered May 10, 1945

This matter having come on to be heard upon defendants' Application for Leave to File a Complaint in the Emergency Court of Appeals pursuant to the provisions of Section 204 (e) (1) of the Emergency Price Control Act, as amended by the Stabilization Extension Act of 1944; and the plaintiff having been given due and timely notice of said application, [fol. 14] and now being represented in open court by the United States Attorney for the District and Division aforesaid; and the Court having considered said Application, and having heard the arguments of counsel, and now being fully advised in the premises, the court finds:

1. That defendants' objections to the validity of the provisions of Section 1347.14 (d) of Maximum Price Regulation No. 30 during the period July 16 to September 11, 1943, are made in good faith, said objections being based upon the fact that said Section fixes the maximum price for and standardizes unsorted waste paper in terms of a specification or standard, "No. 1 mixed paper", and that such provision was in violation of subsection (j) of Section 2 of the Emergency Price Control Act of 1942, known as the Taft Amendment during the period July 16 to September 11, 1943. Defendants are alleged in several counts in the indictment herein to have violated said provision during said period.

2. That there is reasonable and substantial excuse for defendants' failure to present such objections in a protest

filed in accordance with Section 203(a) of the Emergency Price Control Act.

It is therefore ordered:

1. That the defendants, Thomas Paper Stock Company, a corporation, and Alvin E. Sandroff, be and they are hereby granted leave to file in the United States Emergency Court of Appeals a complaint against Chester Bowles, Price Administrator, setting forth said objections to the validity of the provisions of Maximum Price Regulation No. 30, which the defendants are alleged in several counts in the indictment herein to have violated.

2. That any and all further proceedings in the above entitled cause be and the same are hereby stayed during the statutory period in which such complaint may be filed in the [fol. 15] Emergency Court of Appeals pursuant to leave granted herein, and during the pendency of such complaint in the Emergency Court of Appeals and during the pendency of any judicial proceedings instituted by the defendants under paragraph (1) of subsection 204 (e) of the Emergency Price Control Act, as amended, with respect to the provisions of the Regulation above described, and until the expiration of the time allowed in Section 204 of said Act for the taking of further proceedings with respect thereto.

Enter:

Walter J. LaBuy, Judge

Dated this 10th day of May, 1945.

[fol. 16] [Stamp:] United States Emergency Court of Appeals. Filed Jun. 21, 1945. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY

v.

CHESTER BOWLES, Price Administrator

MOTION TO DISMISS COMPLAINT

[fol. 17] Now comes Chester Bowles, Price Administrator, Respondent, by his duly authorized attorney, and pursuant to Rule 13 of the Rules of this Court, moves the Court to dismiss the complaint filed herein.

A memorandum in support of this motion is submitted herewith.

Respectfully submitted, Richard H. Field, General Counsel.

[fol. 18] [Stamp:] United States Emergency Court of Appeals. Filed Jun. 21, 1945. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY

v.

CHESTER BOWLES, Price Administrator

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT

[fol. 19] Statement of the Case

For the purpose of this motion to dismiss the complaint, the factual statement of the case contained in the complaint is adequate.

Argument

The only question presented in this case is whether, under the terms of section 2(j)(3) of the Emergency Price Con-

trol Act, a maximum price regulation embodying a "standardization" of a commodity, legally issued prior to the passage of the Taft Amendment, became invalid on the enactment of that statute, and remained invalid until the Price Administrator publicly announced that he had determined that there was no practicable alternative, for effective price control, to the standardization embodied in the regulation. The question is one only of statutory construction. [fol. 20] Complainants have raised no constitutional issue in this proceeding, nor have they questioned the basis or the formal adequacy of the Administrator's determination that there was no practicable alternative.

The statutory language upon which Complainants rely is as follows:

> (2) (j) Nothing in this Act shall be construed . . .
> (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity.

It is our position that this language, considered in the context of the Emergency Price Control Act, does not require the publication of the Administrator's determination before a provision which standardizes a commodity becomes effective.

It is perfectly clear that the statutory language itself does not compel such a conclusion. Apt language for that purpose would be "No regulation issued under this Act shall, after the effective date of this subsection, standardize any commodity unless and until the Administrator shall have determined and declared that there is no practicable alternative for securing effective price control." Other amendments to the Emergency Price Control Act indicate that Congress well knew how to use language which would have the effect of rendering immediately invalid outstanding regulations (Cf. section 2(k-).

[fol. 21] The ineptness of Complainants' interpretation of the Taft Amendment becomes particularly apparent when it is examined in the context of the Emergency Price Control Act as a whole. The Act represents a departure in administrative rule making primarily because the formal record, justifying the administrative action, is developed in

an administrative proceeding occurring after, rather than before, the action is taken. Originally, and when the Taft Amendment was passed, the Act provided that the question of validity of a regulation could come before this Court only after the Administrator had an opportunity to reconsider his action in the light of objections presented in the protest proceeding. In this context, the protest proceeding would obviously be the place where the standardization provisions of a regulation would be challenged and it would be in such a proceeding that the Administrator, on the basis of the record, would make a final determination as to whether or not the standardization provisions under attack came within the purview of clause 3 or clause 4 of the Taft Amendment.[1] It would seem to follow from the pattern of the statute as a whole that the requirement of an explicit determination under clause 3 could be regarded at most as a prerequisite to judicial determination of the validity of a standardization provision.

[fol. 22] The legislative history of the Taft Amendment contains not the slightest hint that it was intended to effect a radical change in the procedural requirements of the statute. Nor does that history contain any suggestion that Congress intended (as Complainants must assume) any formal or procedural differences in the Administrator's mode of action under clause 3 of the Amendment as contrasted with clause 4. The fact that in one case the phrase "unless the Administrator shall determine" is used, whereas in the other it is not, is inherent in the difference in the conditions prerequisite to the use of standards and specifications under those clauses. Unlike the question whether certain standards and specifications were in general use in an industry prior to price control or their use required by another governmental agency, the existence or non-existence of a "practical alternative" is not susceptible of precise objective establishment but involves primarily an exercise of judgment. It was therefore natural for Congress to use the words "unless the Administrator shall determine" in clause 3 to indicate the exercise

[1] Section 204(e)(1) makes no essential change in the statute in this respect, since it too contemplates administrative proceedings in advance of final judicial determination whenever necessary for the development of an adequate record.

of judgment expected of the Administrator. The words "unless the Administrator shall determine" are thus not essentially different from the words "when in the judgment of the Administrator" used in section 2(a) of the Act.

The conflict between the procedure of the statute as a whole, and Complainants' interpretation of the Taft Amendment, is aggravated by the fact that the clause in question was imported into an established system of nation-wide price controls, built upon several hundred regulations, many of which contained provisions which raised some [fol. 23] question under the clause. Under Complainants' construction, the Taft Amendment would have seriously disrupted the price control structure. It has already been held in *United States* v. *Pepper Bros.*, 142 F. (2d) 340 (C. C. A. 3, 1944), that the Taft Amendment did not automatically repeal regulations such as Maximum Price Regulation No. 30, but at most rendered them invalid. But for all practical purposes, Complainants' interpretation of section 2(j)(3) would have the effect of repealing all standardizing provisions by rendering them unenforceable until the formal finding was made. Certainly the Administrator could not have, simultaneously with its becoming effective, examined all outstanding regulations and made the requisite declarations.

To prevent the Taft Amendment from being read in a manner inconsistent with the basic intention of continuity in price control, there are only two alternatives: (1) the Taft Amendment was not intended to apply to regulations outstanding at the time of the passage of the statute; or (2) the immediate announcement of a determination under clause 3 was not a prerequisite to the continued effectiveness of outstanding regulations containing standardization provisions. The Administrator has always been of the opinion that the Taft Amendment was applicable to regulations in existence on July 16, 1943. This view seems required both by the language of section 2(j) and by the legislative history thereof. It may be observed, however, that if the Administrator is not correct in this interpretation, Complainants' contention necessarily falls.

[fol. 24] The second alternative appears to be the correct one. It gives section 2(j)(3) a meaning and application consistent with the Act of which it forms a part, and consistent with its language. It seems hardly necessary to add that this construction does not deprive section 2(j)(3) of

significance. A person subject to a regulation which, in his opinion, uses specifications not previously in general use in the trade and not previously required by another governmental agency, may in protest proceedings challenge the Administrator's authority to use such specifications under either clause 3 or clause 4 of the Taft Amendment. If the Administrator relies upon clause 3, the protestant may, as we understand it, bring before this Court the reasonableness of the Administrator's determination that there is no practicable alternative for effective price control.

The issuance on September 11, 1943, of an amendment to the preamble of Maximum Price Regulation No. 30, stating the Administrator's determination, and a supplementary statement of considerations setting forth the reasons therefor, cannot in any way be said to imply an acceptance by the Administrator of the position here advanced by [fol. 25] plaintiffs. The Administrator amended the preambles, and issued supplementary statements of considerations, in connection with regulations falling within the terms of clause 4 of the Taft Amendment, although this contains no language which could possibly be construed as requiring the declaration of a finding or a determination. (See paragraphs (a) and (b) of Supplementary Order No. 64 (8 F. R. 12554)).

Our position is, we submit, fortified by recent decisions in which the Supreme Court has emphasized the power of courts, in dealing with problems arising out of the review of administrative action, to avoid the application of mechanical concepts which would preclude the achievement of a result in harmony with the objects of the statute. Thus, in *United States* v. *Morgan*, 307 U. S. 183, 59 S. Ct. 795 (1939), the Court held that although an order of the Secretary of Agriculture was invalid for failure to afford the parties adequate hearing, the market agencies to which the order applied were not automatically entitled to have disbursed to them a fund paid into court representing the difference between the rates in effect prior to the Secretary's order and the lower rates prescribed by that order. The fund was held by the court until determination would be made, by the Secretary, after full hearing, as to the propriety of the rates specified in the "invalid" order.

[fol. 26] An analogous situation was presented to the Court in *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 64 S. Ct. 1215, 1222-1223 (1944), with the important difference that in this case there was no fund in *custodia legis*. The Court held invalid a definition issued by the Administrator of the Wage and Hour Division under the Fair Labor Standards Act, but directed that the case be remanded to the district court and held by it until the Administrator made a valid definition, in the light of the Court's decision, the rights of the parties to the suit to be determined in accordance with the new definition. In discussing the authorities supporting the power of the courts to permit the retroactive validation of past acts, the Court significantly observed that

> * * * in habeas corpus proceedings, even though a petitioner was unlawfully in custody, this Court has allowed continued retention of custody until a valid order could be made.

citing *Mahler* v. *Eby*, 264 U. S. 32, 44 S. Ct. 263 (1924). Cf. *Atlantic Coast Line S. Co.* v. *Florida*, 295 U. S. 301, 55 S. Ct. 713 (1935).

The foregoing considerations are particularly pertinent in a case like the present where the Administrator, at the time of the issuance of the Regulation, necessarily made a determination substantially identical to that required of him by clause 3 of the Taft Amendment. The Administrator never enjoyed unlimited power to standardize commodities. His power to do so stemmed from section 2(g) of the Act which provides:

> [fol. 27] Regulations, orders and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

Obviously, he would have no authority to standardize wastepaper unless he considered such action to be necessary for effective price control. The Administrator so stated his position in discussing the Taft Amendment in his Seventh Quarterly Report to the Congress (pp. 19-20).

## Conclusion

For the foregoing reasons the complaint should be dismissed.

Respectfully submitted, Richard H. Field, General Counsel; Nathaniel L. Nathanson, Associate General Counsel. Jacob D. Hyman, Assistant General Counsel; Josephine H. Klein, Attorney, Office of Price Administration.

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fol. 28] [Stamp] United States Emergency Court of Appeals. Filed June 8, 1945. Herman G. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

Request for Hearing at Chicago, Illinois

Now come the complainants, by their attorneys, and respectfully request that the hearing in the above entitled cause be held at Chicago, Illinois.

Respectfully submitted, David L. Bazelon, Jack H. Oppenheim.

[fol. 23] [File endorsement omitted]

[fol. 24] IN THE UNITED STATES EMERGENCY COURT OF APPEALS

[Title omitted]

MOTION TO STAY THE PROCEEDING—Filed June 28, 1945

Now come the complainants, by their attorneys, and, pursuant to Rule 14 of this Court, move the Court to stay the proceeding until the final disposition by the Supreme Court of the United States of the case there pending on a writ of certiorari directed to this Court for the purpose of reviewing the judgment of this Court entered on March 27, 1945, dismissing the complaint in case No. 159 entitled "Thomas Paper Stock Company, *et al. vs.* Chester Bowles, Price Administrator."

[fol. 25] The grounds upon which this motion is based are:

1. Following the entry of judgment on March 27, 1945 by this Court in case No. 159, complainants, on April 13, 1945, filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, an application for leave to file a complaint in this Court under Section 204 (e) of the Act, as more fully appears on pages 7-12 of the Appendix to the complaint heretofore filed herein. Because of the absence of District Judge Walter J. LaBuy, to whom the case was assigned, the hearing on said application was postponed to May 10, 1945.

2. Meanwhile, on April 26, 1945, the time within which complainants could file a petition for a writ of certiorari from the judgment of this Court in case No. 159 expired, and before such expiration of time complainants on that day did file such a petition in the Supreme Court of the United States, based upon this Court's dismissal of the second objection relied upon in case No. 159.

3. On May 10, 1945, while said petition for a writ of certiorari was still pending and undetermined, District Judge Walter J. LaBuy granted leave to complainants to file a complaint under Section 204 (e) in this Court, as more fully appears on pages 13-15 of the Appendix to the complaint.

4. On or about May 25, 1945, the brief of the respondent in opposition to petition for a writ of certiorari was filed in the Supreme Court of the United States by the Acting Solicitor General, Hugh B. Cox.

5. On May 26, 1945, the Acting Solicitor General sent the following letter to the Clerk of the Supreme Court of the United States:

[fol. 26] May 26, 1945.

Charles Elmore Cropley, Esq., Clerk, Supreme Court of the United States, Washington, D. C.

Re: No. 1206—Thomas Paper Stock Company, et al. vs. Chester Bowles, Price Administrator

DEAR MR. CROPLEY:

We have just been advised that in *United States* v. *Thomas Paper Stock Company*, a criminal case in the United States District Court for the Northern District of Illinois, referred to in our brief in opposition to certiorari in No. 1206 (p. 4), the District Court on May 10, 1945, granted leave to defendants, petitioners in No. 1206, to file a complaint in the Emergency Court of Appeals pursuant to Section 204(c) of the Emergency Price Control Act, and that the proceedings in the District Court have been stayed pursuant to the same section.

Will you kindly bring this information to the attention of the Court in connection with its consideration of the petition and brief in opposition in No. 1206. See, particularly, the Government's brief in opposition at pages 7-10.

A copy of this letter is being sent to counsel for petitioners.

Very truly yours, Hugh B. Cox, Acting Solicitor General.

[fol. 27] 6. On May 29, 1945, the following reply to the foregoing letter was sent to the Clerk of the Supreme Court of the United States:

May 29, 1945.

Charles Elmore Cropley, Esq., Clerk, Supreme Court of the United States, Washington, D. C.

Re: No. 1206—Thomas Paper Stock Company, et al. vs. Chester Bowles, Price Administrator

DEAR MR. CROPLEY:

We have received a copy of Acting Solicitor General Cox's letter of May 26, 1945, calling attention to the order entered by the United States District Court on May 10, 1945.

In this connection, we desire to point out that notwithstanding the granting of leave to file a complaint in the Emergency Court of Appeals pursuant to Section 204 (e) of the Emergency Price Control Act, the question still remains whether the Emergency Court of Appeals has jurisdiction of such a complaint in the situation in the case at bar. If, as we contend in the Petition for Certiorari, the Emergency Court had jurisdiction of the complaint filed pursuant to Section 204 (a), and should have decided said complaint upon the merits, then it would not have jurisdiction of a complaint filed pursuant to leave granted under Section 204(e).

We also desire to point out that the granting of leave under Section 204(e) in the criminal case affords no relief against the invalidity of the same regulation which is involved in the treble damage action referred to in the Petition for Certiorari.

A copy of this letter is being sent to the Acting Solicitor General.

Yours very truly, Claude A. Roth, Counsel for Petitioner.

[fol. 28] 7. On June 4, 1945, said petition for a writ of certiorari was granted by the Supreme Court of the United States.

8. Complainants have ascertained from the Clerk of the Supreme Court of the United States that the letters set

forth in paragraphs 5 and 6 above were delivered to the Justices of the Supreme Court of the United States prior to the granting of the writ of certiorari.

9. As hereinabove appears, the Supreme Court of the United States has taken jurisdiction of the matter. One of the questions which it will resolve is whether this Court had jurisdiction of the second objection relied upon in the complaint filed under Section 204 (e). If the Supreme Court should determine that this Court did have jurisdiction thereof and that it erroneously dismissed the complaint as to that objection, without consideration of the merits, the result will be a holding that this Court does not have jurisdiction of the present complaint filed under Section 204 (e). In that event, it would be erroneous for this Court to enter any order either granting or denying upon the merits the relief sought in the present complaint; and the only proper order would be a dismissal of the present case for want of jurisdiction.

If this proceeding is not stayed, a judgment entered herein in favor of either party may be inconsistent with the judgment of the Supreme Court of the United States, and thus further prolong and complicate the litigation.

Wherefore, complainants pray that an order be entered by this Court staying the proceeding until the final disposition by the Supreme Court of the United States of the aforesaid cause there pending.

David L. Bazelon, Jack H. Oppenheim, Attorneys for Complainants. Address for Service: 231 South La Salle Street, Chicago 4, Illinois.

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[fol. 29] In United States Emergency Court of Appeals

Motion for Enlargement of Time—Filed June 28, 1945

Now come the complainants, by their attorneys, and, pursuant to Rule 22 (c) of this Court, move this Court to enlarge the period allowed by Rule 14 (b) and (c) within which complainants may file objections to respondent's motion to dismiss and a brief in support thereof.

The grounds upon which this motion is based are:

1. Complainants have filed simultaneously herewith a motion to stay the proceeding. If the latter motion is

granted, there will be no occasion for the Court to consider respondent's motion to dismiss until after the final disposition by the Supreme Court of the United States of the case there pending on a writ of certiorari, more fully described in complainants' motion to stay the proceeding.

2. In the event that complainants' motion to stay the proceeding is granted, complainants request that this Court simultaneously enter an order retaining jurisdiction to fix the time after the disposition of said case in the Supreme Court of the United States within which complainants may file their objections to respondent's motion to dismiss and brief in support thereof. In the event that the judgment in case No. 159 is reversed, and the cause remanded, it will become unnecessary for complainants to file objections to respondent's motion to dismiss the complaint herein.

3. In the event that complainants' motion to stay the proceeding is denied, complainants request that this Court enter an order extending complainants' time to file objections to respondent's motion to dismiss and a brief in support thereof until July 31, 1945; and in support of this request complainants' attorneys represent unto the Court [fol. 30] that they are presently under pressure to meet the following deadlines:

(1) Not later than July 22, 1945, they must file in the United States Circuit Court of Appeals for the Seventh Circuit a transcript of record in a case which occupied three weeks of trial, in which there are some 1,600 pages of testimony and numerous voluminous exhibits;

(2) Not later than July 20, 1945, they must file in the United States Circuit Court of Appeals for the Sixth Circuit an assignment of errors and bill of exceptions in a criminal case involving O. P. A. regulations;

(3) Not later than July 1, 1945, they must file a complaint in this Court under Section 204(a) of the Act based upon the dismissal of a protest by the Price Administrator on June 1, 1945 following the filing of a petition for mandatory relief in this Court.

(4) During the same period they must work on the preparation of a brief to be filed in the Supreme Court of the United States in the matter of the review of the judgment of this Court in case No. 159.

In addition to the foregoing, complainants' attorneys must spend considerable time in research into the legislative history of the Taft Amendment to the Emergency Price Control Act, as well as in other legal research, so that they may be in a position to adequately present their objections to respondent's motion to dismiss the complaint herein.

Wherefore, complainants pray that this Court will enter such order consistent with the foregoing as to this Court may seem proper.

David L. Bazelon, Jack H. Oppenheim, Attorneys for Complainants. Address for Service: 231 South La Salle Street, Chicago 4, Illinois.

[fol. 37] [Stamp] United States Emergency Court of Appeals. Filed Jun. 5, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

Answer to Complainants' Motions to Stay the Proceeding and for Enlargement of Time

Now comes Chester Bowles, Price Administrator, by his duly authorized attorney, and presents the following objections to Complainants' motion to stay the proceeding until the final disposition by the United States Supreme Court of the case there pending on a writ of certiorari directed to this Court for the purpose of reviewing the judgment of this Court entered on March 27, 1945, dismissing the complaint in case No. 159, entitled Thomas Paper Stock Company, et al. v. Chester Bowles, Price Administrator.

1. Complainants advance as the sole ground for their motion the suggestion that if the Supreme Court should determine that this Court had jurisdiction to pass upon the second objection relied upon in the complaint in case No. 159, the result would be a holding that this Court would not have jurisdiction of the present complaint filed [fol. 38] under section 204(e). We submit that this suggestion is erroneous. This Court now has jurisdiction of the complaint herein filed under section 204(e) and a decision by the Supreme Court with respect to this Court's jurisdiction on the previous complaint will not effect this Court's jurisdiction on the present complaint. If the Supreme Court should determine, while the complaint herein was still pending, that this Court did have jurisdiction of the previous complaint, the result would merely be that there would be two complaints pending in this Court raising the same objections and it would be within this Court's discretion to determine which should go forward. Even

if it had been unnecessary and, in a sense, erroneous for the district court to grant leave to present in a 204(e)(1) proceeding objections which had already been presented in a protest filed in accordance with section 203(a), such error would not go to the jurisdiction of either the district court or of this Court. It would be comparable to the error which would occur if the district court were to find that there is reasonable and substantial excuse for failure to present an objection in the protest proceeding when there was in fact no basis for such finding. In such a case this Court would certainly not regard the question as one of its own jurisdiction justifying the review of the district court's finding.

2. The peculiar situation arising in this case is not the only one which might lead to the pendency of two complaints in this Court by the same parties, presenting the same objections, one under section 204(a) and the other under section 204(e)(1). It will be noted that section 204(e)(2) contemplates a stay of enforcement proceedings [fol. 39] during the pendency of a protest, or complaint following denial of a protest, only if the protest was properly filed under section 203 prior to the institution of the enforcement proceedings. The district court might, therefore, in order to justify granting a stay, consider it proper to grant leave to file a complaint setting forth objections which were already presented in a protest proceeding or even in a complaint in this Court but which had not been presented prior to the institution of the enforcement proceeding. In such a case, too, it would be within the discretion of this Court to determine which case should go forward.

This particular case illustrates the foregoing point. Complainants' protest was filed on June 15, 1944, whereas the complainants had been indicted in the United States District Court for the Northern District of Illinois on December 17, 1943. Thus, the filing of the protest would not have properly been a ground for a stay in the enforcement proceeding even if all the objections included therein were presented in accordance with section 203(a). The district court might, therefore, consistently with the statute, have granted leave to present the same objections in a complaint filed under section 204(e)(1), if it were satisfied that there was reasonable and substantial excuse for failure to file a

protest before the institution of enforcement proceedings and if it wished to provide a proper basis for a stay of the enforcement proceedings.

3. It is suggested in the letter of Mr. Roth to Mr. Cropley, which appears on page 4 of Complainants' motion that "the granting of leave under Section 204(c) in the criminal [fol. 40] case affords no relief against the invalidity of the same regulation which is involved in the treble damage action" pending against the Complainants. This suggestion too is apparently based upon a misreading of the statute, which provides that a determination of invalidity of a particular regulation shall be a basis for dismissal of any pending proceeding to the extent that it is based upon such provision. A determination in favor of the complainants herein will provide complete protection to the Complainants in the treble damage action as well as in the criminal case providing that it is arrived at while the treble damage action is pending. It appears, therefore, that there is every reason, from the point of view of the legitimate interests of the Complainants as well as of the public interest in expeditious determination of this litigation, that proceedings upon this complaint should not wait upon determination by the Supreme Court of the case pending therein.

Respondent does not object to Complainants' motion for enlargement of time until July 31, 1945 for the filing of objections to Respondent's motion to dismiss and a brief in support thereof. Respondent wishes to point out, however, that the question presented by the Complainants has already been fully briefed and argued before this Court. Because of the public interest in expeditious determination of this litigation, which is now the basis for delay of enforcement proceedings pending against Complainants, and also in view of the public interest in curtailing unnecessary travel, Respondent respectfully suggests that oral argument on the motion may properly be dispensed with.

Respectfully submitted, Richard H. Field, General Counsel.

[fol. 41] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 10, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

Present: Maris, C. J., and Magruder, McAllister, and Lindley, JJ.

ORDER

Upon consideration of Complainants' motion to stay the proceedings and for enlargement of time for filing their objections to Respondent's motion to dismiss the complaint and their brief in support thereof, and of Respondent's answer to said motions,

It is Ordered that Complainants' motion to stay the proceeding be, and the same hereby is, denied.

It is Further Ordered that Complainants' motion for enlargement of time for filing their objections to Respondent's motion to dismiss the complaint and their brief in support thereof be, and the same hereby is, granted, and the time for filing the same is hereby enlarged to July 31, 1945.

By the Court.

Teste: Herman C. Beasley, Clerk.
July 10, 1945.

[fol. 42] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 27, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

MOTION FOR ENLARGEMENT OF TIME

Now come the complainants by their attorneys and move the Court for entry of an order extending to August 7, 1945, the time within which complainants may file their objections to respondent's motion to dismiss.

In support of this motion complainants' attorneys say that the enlargement of time is required by them for the adequate preparation of their objections. A stipulation of the parties for such extension is filed herewith.

David L. Bazelon, Jack H. Oppenheim, Attorneys for Complainants.

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[fol. 43] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 27, 1945. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY

v.

CHESTER BOWLES, Price Administrator

STIPULATION

It is hereby stipulated and agreed between the Complainants, by their duly authorized attorneys, and the Price Administrator, by his duly authorized attorney, that the time

within which the Complainants are required to file their Objections to the Motion to Dismiss the Complaint may be extended to and including August 7, 1945.

David L. Bazelon, Jack H. Oppenheim, Attorneys for Complainants; Nathaniel L. Nathanson, Attorney for Price Administrator.

Dated: July 27, 1945.

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[fol. 44] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 27, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

ORDER

Upon consideration of Complainants' motion for enlargement of time to and including August 7, 1945, within which to file their objections to the motion to dismiss the Complaint, and of Stipulation filed herein by the parties agreeing to the enlargement,

It is Ordered that Complainants' motion be, and it hereby is, granted.

By the Chief Judge.

Teste: Herman C. Beasley, Clerk, by J. Frederick Mattingley, Chief Deputy Clerk.

July 27, 1945.

[fol. 37] [File endorsement omitted]

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

OBJECTIONS TO MOTION TO DISMISS COMPLAINT—Filed August 7, 1945

Now come the complainants by their attorneys, and object to the motion to dismiss the complaint for the reasons set forth in the memorandum submitted herewith.

Respectfully submitted, Homer Cummings, Jack H. Oppenheim, Attorneys for Complainants.

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[fol. 38] IN THE UNITED STATES EMERGENCY COURT OF APPEALS

[Title omitted]

MEMORANDUM IN SUPPORT OF OBJECTIONS TO THE MOTION TO DISMISS COMPLAINT—Filed August 7, 1945

Counsel for the Administrator correctly state that the question presented in this case is one only of statutory construction. The precise question, however, is not—as put by them—whether a *public announcement* of the determination required by Section 2(j)(3) is made a condition precedent to standardization. The question presented is whether the statute does not make it a condition precedent to standardization that the required determination be in fact made and officially expressed of record, even though not publicly announced.

We do not complain of the failure to make a "publicly announced" determination. What we complain of is that the required determination was not in fact made prior to September 11, 1943, and that until it was made Section 1347.14(d) of MPR 30 was invalid.

[fol. 39] *The Actual Issue.*—The real issue is clear. It is the Administrator's contention that he was not required to "make a final determination as to whether or not the standardization provisions under attack came within the purview of clause 3 or clause 4 of the Taft amendment" prior to the initiation of a protest proceeding (Adm. Mem. p. 3). It is the complainants' contention

that the Administrator cannot thus postpone the making of the required determination. We submit that the Administrator is under a statutory injunction *affirmatively to determine* that there is no practicable alternative to standardization *before, and not after,* he issues an order fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards not in general use in the trade or industry affected, and which have not previously been promulgated and their use lawfully required by another Government agency.

*Clauses (3) and (4) of Section 2(j) Construed Together.* The construction here contended for by complainants follows inescapably from the construction placed upon section 2(j) of the Act by this Court in its decision in case No. 159. There the Court sustained the Administrator's contention that "there is a third situation in which Section 2(j) authorizes him to make use of specifications or standards for the purpose of fixing maximum prices. * * * clauses (3) and (4) of Section 2(j) are to be read together as providing three alternative situations in any one of which he is authorized to employ specifications or standards in connection with price control." We submit that if clauses 3 and 4 are to be read together, and their arrangement in the disjunctive ignored, then the phrase "prior to such order" which appears in clause 4 must be linked, as a matter of logic, to the clause "unless the Administrator shall determine" which appears in clause 3. That is to say, a logical [fol. 40] reading of clauses 3 and 4—taken together to express the three situations in which the Administrator may use specifications or standards—would be as follows:

> "Nothing in this Act shall be construed * * * as authorizing any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order (1) in general use in the trade or industry affected, or (2) promulgated and their use lawfully required by another Government agency, or (3) determined by the Administrator to be essential because no practicable alternative exists for securing effective price control with respect to such commodity."

The Administrator's express determination that there is no practicable alternative is a made condition, on a par with the other two conditions, under which standardization becomes permissible. Whichever of the three conditions is met, it must be capable of objective ascertainment. It is obviously capable of ascertainment whether the standards or specifications have been in general use in the trade or industry affected. It is likewise ascertainable whether they have been promulgated and their use lawfully required by another Government agency. It must by the same token be ascertainable, when neither of the first two conditions is met, that the Administrator *has in fact determined* that no practicable alternative exists, and that such actual determination was made *prior to the issuance of the standardization order.* To say that the Administrator's determinationsthat there is no practicable alternative need not be officially expressed of record prior to the effectiveness of a standardization order, is to destroy the logic of the construction under which clauses 3 and 4 are read together and their arrangement in the disjunctive ignored.

[fol. 41] *The Function of the Protest Proceedings.*—The Administrator's contention that "a final determination" may be postponed until the matter is presented for his consideration in a protest proceeding simply begs the question. "The Act," argues the Administrator, "represents a departure in administrative rule-making primarily because the formal record, justifying the administrative action, is developed in an administrative proceeding occurring after, rather than before, the action is taken. Originally, and when the Taft amendment was passed, the Act provided that the question of validity of a regulation could come before this Court only after the Administrator had an opportunity to reconsider his action in the light of objections presented in the protest proceeding. In this context, the protest proceeding would obviously be the place where the standardization provisions of a regulation would be challenged * * *." This argument might have some basis if the validity of the Administrator's determination made on September 11, 1943, were the subject of inquiry. In such a case, the question presented would not be whether the Administrator had in fact made the required determination, but whether the determination was an arbitrary or unreasonable one. Then, perhaps, it might be said that "the formal record, justifying

the administrative action, is developed in an administrative proceeding occurring after, rather than before, the action is taken." Upon judicial review, this Court could recognize that there was some conflict on the question whether there was a practicable alternative to effective price control, yet at the same time find that the Administrator's determination that there was no practicable alternative was not an arbitrary or unreasonable one. The record made in the protest proceeding would be the basis of the judicial determination of the validity of the standardization provision.

[fol. 42] But it is an unwarranted distortion of the pattern of the statute to say that the requirement of an explicit determination under clause 3 of the Taft amendment may be regarded, as the Administrator contends, "at most as a prerequisite to judicial determination of the validity of a standardization provision."

The type of evidence which it is contemplated by the Act will be developed in a protest proceeding—the type of evidence which would give the Administrator "an opportunity to reconsider his action in the light of objections presented"—is clearly irrelevant and immaterial to the question whether the explicit determination required by clause 3 has in fact been made.

*The Legislative Intent is Clear.*—The language used in the statement of the Managers on the part of the House in the Conference Report accompanying H. J. Res. 147 on July 8, 1943 (H. Rep. No. 697, 78th Cong., 1st Sess., p. 3) sustains our contention:

> "The third clause requires that *before* any commodity may be standardized, the Administrator *must determine* that no practicable alternative method exists for securing effective price control of the commodity." (Emphasis added.)

In the concluding paragraph of the same statement it is said that the enactment of the provision in question makes clear "the circumstances under which the Administrator may Act."

*The Administrator's Recognition of the Legislative Intent.*—The clear legislative intent thus expressed is that the Administrator's determination is a *condition precedent* to the effectiveness of any attempted standardization. This

was recognized by the Administrator himself on September 11, 1943, in the statement of reasons involved in the issuance of Supplementary Order No. 64 (incorporating by reference the same as those for the issuance of Supple- [fol. 43] mentary Order No. 55). The discussion in the latter document of the legislative history of clause 3 of the Taft amendment unequivocally asserts that the Administrator has authority to establish standards only when he makes the required determination. Thus it is said in the fifth paragraph of the Administrator's statement:

> "The clause recognizes the Administrator's authority to establish standards *whenever he determines* "that no practicable alternative exists for securing effective price control with respect to a commodity." (Emphasis added.)

Again, in the fourteenth paragraph of the same document, it is recognized that the determination is a condition precedent to standardization:

> "Read in conjunction with clause 3, this merely emphasizes that clause 4 forbids the Administrator to employ standards in price control when those standards fail to meet the stringent conditions of clause 4 *unless he can bring his action within the exception to clause 3 by making a determination* that no practicable alternative to standardization exists for securing effective price control." (Emphasis added.)

Indeed, the fact that the making of a determination is a condition precedent, is declared in so many words by the Administrator in the sixteenth paragraph of the same document, when he describes the requirement as a "*condition*" which must be "*met*" before effectuating standardization.

*The Basic Fallacy of the Administrator's Contention.*— It is the Administrator's position, in effect, that he can ignore the requirements of the Taft amendment until such time as the question is raised by protest and that then for the first time, he can "declare" his determination of compliance with the Taft amendment. Obviously if no protest were ever filed, we would have a situation where the Ad- [fol. 44] ministrator was never required to make the determination which the statute specifically requires. This

would leave the Administrator in the position of being able to standardize a commodity at will, regardless of whether there was a practicable alternative thereto. The restrictions placed upon him by the Taft amendment would thereby lose all meaning, in that the congressional intention to prevent disruption of industry practices by standardization, except as a last resort when no alternative to effective price control existed, would be completely nullified. *The statutory injunction to the Administrator to affirmatively make a determination before resorting to standardization would be transformed into a statutory permission to standardize any commodity until such time as a protestant is able to show that there is a practicable alternative to such standardization.* A construction of the Taft amendment which leads to this result cannot be sustained.

*Pre-existing Regulations Are Affected.*—Certainly the Congress enacted the Taft amendment specifically to limit the Administrator's authority. It intended that he make the determination *before* issuing the regulation, and not afterward. This intention was applicable to pre-existing as well as to new regulations. The Administrator argues that he could not, simultaneously with the Taft amendment's becoming effective, have examined all outstanding regulations and made the requisite determinations. This is true, and serves to emphasize the fact that he did not, in the present case, make even an unexpressed determination. It is not true, however, that the Congress had not considered the impact of the Taft amendment upon existing regulations. In the statement of the Managers on the part of the House in the Conference Report it was said:

> "The purpose of this amendment to section 2 of the Emergency Price Control Act of 1942, as amended, [fol. 45] is to *meet the objection that the Price Administrator has exceeded the limitations expressed in section 2 (h) of that act in issuing certain regulations already promulgated.*" (Emphasis added.)

The Administrator argues that under our interpretation the Taft amendment would have seriously disrupted the price control structure. It is apparent, however, that the Congress was of the opinion that the Administrator himself had seriously disrupted the kind of price control struc-

ture intended originally to have been limited by section 2 (h) of the Act. The Administrator's reliance upon "the basic intention of continuity in price control" simply overlooks the obviously basic intention of continuity of *lawful* price control.

The considerations which led to the statutory requirement of an express determination outweighed such considerations as that a short time might elapse between the passage of the amendment and the Administrator's action in pursuance thereof, during which time a limited number of regulations were open to attack. The situation is no different than that presented when the Administrator is considering the issuance of a new regulation setting up commodity standards. There is necessarily involved a period of time during which the Administrator must examine into the question of practicable alternatives to standardization. During that time, and before he makes his determination, the issuance of the regulation is postponed or delayed.

*The Determination Must Be An Express One.*— It is well settled that where a statute delegates authority to an administrative body to make orders or issue regulations upon the basis of an administrative finding or determination of the existence of certain facts or circumstances, the omission to make a required finding or determination renders the orders or regulations invalid. Where a stat-[fol. 46]-ute requires an administrative finding, such finding must be *express* rather than implied. *Wichita Railroad and Light Company* v. *The Public Utilities Commission*, 260 U. S. 48, 43 S. Ct. 51 (1922).

The Administrator cites *United States* v. *Morgan*, 307 U. S. 183, 59 S. Ct. 795 (1939), and *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 64 S. Ct. 1215, 1222-1223 (1944), as emphasizing the power of courts "to avoid the application of mechanical concepts which would preclude the achievement of a result at harmony with the objects of the statute." We submit that ours is not an attempt to apply a mechanical concept which would preclude the achievement of a result in harmony with the objects of the Taft amendment. On the contrary, we believe that the legislative history of that amendment emphasizes the congressional intent to require "that *before* any commodity may be standardized, the Administrator *must determine* that no practicable alternative method exists for securing effec-

tive price control of the commodity." The cases cited by the Administrator are not in point.

*Section 2 (j) Is Not An Automatic Repealer.*—The Administrator misstates the case when he says that "complainant's interpretation of Section 2 (j) (3) would have the effect of repealing all standardizing provisions by rendering them unenforceable until the formal finding was made."

Our interpretation of section 2 (j) (3) is not in conflict with the holding in *United States* v. *Pepper Bros.*, 142 F. 2d 340 (C. C. A. 3, 1944). Under that decision, a regulation which fails to satisfy the requirements of the Taft amendment is enforceable *during the period in which the invalidity of the regulation has not yet been established by judgment of the Emergency Court of Appeals.* At the time of the *Pepper* decision it was still an open question as to whether, once the invalidity had been determined, the judg- [fol. 47] ment of invalidity could be used as a defense to a criminal prosecution based upon violations which occurred prior to the judgment of invalidity. That question is no longer open, in view of the provisions of section 204 (e) (2). Pending enforcement proceedings based upon violations occurring before the adjudication of invalidity must be dismissed. Our interpretation of section 2 (j) (3) makes consonant the holding in the *Pepper* case with the provisions of section 204 (e) (2).

## Conclusion

For the foregoing reasons, the motion to dismiss the complaint should be denied.

Respectfully submitted,

HOMER CUMMINGS,
JACK H. OPPENHEIM,
*Counsel for Complainants.*

[fol. 56] [Stamp:] United States Emergency Court of Appeals. Filed Aug. 7, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

MOTION FOR ORAL ARGUMENT

Now come the complainants in the above-entitled case by their counsel, Homer Cummings and Jack H. Oppenheim and move that the above-entitled case be placed on the hearing calendar at Washington, D. C. for argument on the Price Administrator's motion to dismiss and the complainants' objections thereto.

In support of such motion the complainants show:

1. The issue presented on the motion to dismiss and the objections thereto appears to be determinative of the case since it is the understanding of counsel that the Office of Price Administrator will raise no serious question as to the correctness of the allegations of fact contained in the complaint nor any other question of law with respect thereto. In this event, of course, no further oral argument on the merits would seem necessary or desirable.

[fol. 57] 2. Fixing of Washington, D. C. as the place for argument will eliminate any question as to imposition of additional burden on transportation facilities and will obviate any difficulty that counsel for the Price Administrator might have in obtaining transportation.

Respectfully submitted, (S.) Homer Cummings, Jack H. Oppenheim, Attorneys for Complainants.

[fol. 58] [Stamp:] United States Emergency Court of Appeals. Filed Aug. 7, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

ORDER

It is ordered that Respondent's motion to dismiss the complaint in the above entitled case be assigned for determination to a division of the Court consisting of Chief Judge Maris, Judge Lindley, and Judge Laws.

By the Chief Judge.

Teste: Herman C. Beasley, Clerk.
August 7, 1945.

* * * * * * *

[fol. 59] Friday, September 7, 1945.

* * * * * * *

Pursuant to adjournment and call of the Chief Judge, the Court met at 10:30 A. M., at Washington, D. C.

* * * * * * *

Before Honorable Albert B. Maris, Chief Judge, Honorable Walter C. Lindley and Honorable Bolitha J. Laws, Associate Judges

* * * * * * *

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

Argument on Respondent's motion to dismiss the complaint commenced by Mr. Nathaniel L. Nathanson, for Respondent, continued by Mr. Jack H. Oppenheim, for Complainant, and concluded by Mr. Nathaniel L. Nathanson, for Respondent.

* * * * * * *

[fol. 50] IN UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY AND ALVIN E. SANDROFF

vs.

CHESTER BOWLES, Price Administrator

Heard at Washington September 7, 1945

Before Maris, Chief Judge, and Lindley and Laws, Judges.

*Mr. Jack H. Oppenheim*, with whom *Mr. Homer Cummings* was on the brief, for the complainants.

*Mr. Nathaniel L. Nathanson*, Associate General Counsel, with whom *Messrs. Richard H. Field*, General Counsel, *Jacob D. Hyman*, Assistant General Counsel, and *Miss Josephine H. Klein*, Attorney, all of the Office of Price Administration, were on the brief, for the respondent.

OPINION OF THE COURT SUR MOTION TO DISMISS—Filed October 5, 1945

By MARIS, *Chief Judge*.

This complaint, which has been filed under Section 204(e)(1) of the Emergency Price Control Act with leave of the United States District Court for the Northern District of Illinois, properly brings to us for consideration the objection of the complainants to Section 1347.14(d) of Maximum Price Regulation No. 30, Wastepaper, which we held we had no power to consider in connection with their prior complaint filed under Section 204(a). See Thomas Paper Stock Co. v. Bowles, 148 F. 2d 831 (1945). The objection is that by virtue of the Taft Amendment, which added Subsection (j) to Section 2 of the Emergency Price Control Act, Section 1347.14(d) of MPR 30, which fixed the maximum price for unsorted wastepaper in terms of a specification or standard, was rendered invalid from July 16, 1943, the date of enactment of the Taft Amendment, until September 11, 1943, the date on which the Price Administrator made a formal determination that no practicable alternative thereto existed for securing effective price control with respect to such wastepaper.

So far as material Section 2(j), the Taft Amendment, provides:

> "(j) Nothing in this act shall be construed * * * (3) as authorizing the Administrator to standardize any commodity, unless the Administrator shall determine, with respect to such standardization, that no practicable alternative exists for securing effective price control with respect to such commodity; or (4) as authorizing [fol. 51] any order of the Administrator fixing maximum prices for different kinds, classes, or types of a commodity which are described in terms of specifications or standards, unless such specifications or standards were, prior to such order, in general use in the trade or industry affected, or have previously been promulgated and their use lawfully required by another Government agency."

In the complainants' prior case (148 F. 2d 831) we decided that clauses (3) and (4) which we have just quoted must be read together as providing three alternative situations in any one of which the Administrator is authorized to employ specifications or standards in connection with price control. We accordingly held that Section 2(j) did not operate to invalidate Section 1347.14(d) of MPR 30 merely because the specification or standard employed by that section had not previously been used by the wastepaper industry or required by another Government agency, the two situations described in clause (4). The present case involves the effect of clause (3) upon the validity of Section 1347.14(d) of the regulation. In order to frame the precise question which is presented for decision the exact facts from which it arises must be stated.

Section 1347.14(d) of MPR 30 was issued and in force prior to the passage of the Taft Amendment. Its validity prior to the passage of that Amendment is not questioned. It made use of a specification or standard in fixing the maximum prices for unsorted wastepaper. No practicable alternative to the use of this specification or standard existed for securing effective price control with respect to such wastepaper. The Administrator expressly so determined in his supplementary statement of considerations to MPR 30 issued September 11, 1943 and the validity of his determination is not questioned by the complainants here.

On the contrary they concede that by reason of it the regulation was entirely valid under Section 2(j)(3) after September 11, 1943.

It will be observed that the application of Section 2(j)(3) to a new price regulation issued after its enactment is not involved in this case. Nor do we have before us a regulation which uses a specification or standard where there is in fact another practicable alternative to its use for securing effective price control. The narrow question which this case presents is whether a previously valid price regulation which, because there was no practicable alternative for securing effective price control, used a specification or standard not previously used or required, was rendered invalid by subsection (j)(3) of Section 2 from the time of the enactment of that subsection until the time when the Administrator determined and recorded the fact that no such alternative to the use of the specification or standard existed. In other words, did the Taft Amendment require a prior determination by the Administrator of that fact in the case of a regulation which had been validly issued before the enactment of the Amendment and did it operate to invalidate the regulation in the interim?

We do not think that the Taft Amendment can properly be construed to have that effect. Its purpose as disclosed in clauses (3) and (4) was to prohibit the use by the Administrator of specifications and standards in all except three specified cases. These excepted cases were: (1) if specifica- [fol. 52] tions or standards were already in general use in the industry, (2) if their use had already been lawfully required by another Government agency, or (3) if there was no practicable alternative to their use for securing effective price control. Obviously it was not the purpose of Congress to bar the use in a regulation of a specification or standard if it could fairly be said that no practicable alternative to its use existed for securing effective price control. Under the construction urged by the complainants, however, the Taft Amendment would have the effect prior to a determination by the Administrator of invalidating an existing regulation which employed specifications or standards not theretofore used or required even though it might be perfectly clear that the regulation was within the intent of the exception to the Taft Amendment's ban because no other possible alternative for securing effective price control existed.

Such a capricious result demonstrates that the construction contended for by the complainants is unsound. It would impute to Congress the intention, in the face of the menace of inflation which confronted the country in the summer of 1943, of creating a breach in the dyke protecting the nation's price structure by an immediate wholesale invalidation of all existing regulations which employed specifications or standards not previously used or required. The result would have been that a large segment of the nation's economy would have been left wholly at the mercy of inflationary pressures during the period of time required by the Administrator to review the regulations and the situation of each industry concerned and to ascertain in each case whether any practicable alternatives for securing effective price control existed. In the light of the Congressional direction to stabilize prices which had been given to the President by the Stabilization Act passed only nine months previously and in view of the grave danger of inflation which confronted the country when the Taft Amendment was passed such an intention on the part of Congress is unthinkable.

It may be urged that Congress intended the Administrator immediately after the enactment of the Taft Amendment to make a determination under Section 2(j)(3) with respect to each existing regulation containing specifications or standards. The Taft Amendment does not in terms so require, however, and in view of the complexities of the problem, involving many industries, such an immediate determination was clearly impossible. Time was obviously required for investigation and consideration. Unquestionably the Administrator acted with reasonable promptness in making his determination as to MPR 30 in less than two months after the Taft Amendment became law. We think that the Taft Amendment required no more of him than this. Our conclusion is that Section 1347.14(d) of MPR 30 was not invalid between July 16, 1943 and September 11, 1943 by reason of its use of a specification or standard.

The complainants urge that the conclusion thus reached is unfair to them because they were left in doubt as to the validity of the regulation during the interim between the passage of the Taft Amendment and the Administrator's determination. But the Taft Amendment did not render the regulation invalid on its face. United States v. Pepper Bros., 142 F. 2d 340 (C. C. A. 3, 1944). Its validity de-

pended upon whether it could reasonably be said that the [fol. 53] use of the specification or standard was the only practicable method for securing effective price control of unsorted wastepaper. The complainants, as active members of the wastepaper industry, were in a position to know whether this was so and, therefore, to form an intelligent judgment as to the effect of the Taft Amendment upon the regulation. Moreover if they were in doubt during that time it was open to them by protest to question the validity of the regulation and to secure a determination of that question. This they did not do. On the contrary they proceeded to violate the regulation without taking the steps which were open to them to test its continued validity. Under these circumstances they can hardly assert that they were denied due process by the failure of the Administrator to make his determination before they violated the regulation. Compare Yakus v. United States, 321 U. S. 414, 447 (1944).

A judgment will be entered dismissing the complaint.

### Dissenting Opinion

Lindley, Judge, dissenting:

I am sorry that I cannot agree with the majority opinion.

If the legislature delegates to an executive or administrative body authority to promulgate regulations or enter orders, provided a certain administrative finding or determination of existence of certain facts be made, the delegated authority fails in the absence of the requisite finding or determination. Mr. Chief Justice Hughes' announcement in Panama Refining Co. v. Ryan, 293 U. S. 409 at 432, is pertinent: "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown." And Mr. Justice Brandeis, in United States v. B. & O. R. Co., 293 U. S. 454, in discussing certain authority of the Interstate Commerce Commission, made similar comment, saying: "The Act * * * conferred authority, (on the Commission), to prescribe by rule, specific devices, or changes in the equipment, only where these are required to remove 'unnecessary peril to life or limb': * * * its

finding to that effect is essential to the existence of authority to promulgate the rule; and as Congress has made affirmative orders of the Commission subject to judicial review, * * * the order may be set aside unless it appears that the basic finding was made. * * * complete absence of the basic or essential findings required to support the Commission's order renders it void." See also Wichita Railroad & Light Company v. Public Utilities Commission of the State of Kansas, et al., 260 U. S. 48, and Mahler et al. v. Eby Inspector in Charge Immigration Service, etc., 264 U. S. 32. In the latter case the court commented concerning a warrant of the Secretary of Labor that, inasmuch as it lacked the finding required by the Statute, it was invalid; that the defect went "to the existence of the power on which the proceeding rests."

That the Congress intended by the amendment that no regulation, new or already existing, standardizing commodities should have validity until the requisite determina-
[fol. 54] tion had been made seems obvious from the statement of the managers on the part of the House of Representatives in the Conference Report accompanying H. J. Res. 147 on July 8, 1943 (H. Rep. No. 697, 78th Cong. 1st Sess., p. 3) as follows: "The third clause requires that before any commodity may be standardized the Administrator must determine that no practicable alternative method exists for securing effective price control of the commodity." The Administrator himself said in his statement of reasons involved in the issuance of Supplementary Order No. 64: "The Clause recognizes the Administrator's authority to establish standards whenever he determines 'that no practicable alternative exists for securing effective price control with respect to' a commodity"; and, "Read in conjunction with clause 3, this merely emphasizes that clause 4 forbids the Administrator to employ standards in price control when those standards fail to meet the stringent conditions of clause 4 unless he can bring his action within the exception to clause 3 by making a determination that no practicable alternative to standardization exists for securing effective price control." He described such action as a condition with which he was required to comply before effectuating standardization.

But the Administrator now takes the position that the unamended regulation possesses all the support necessary to a suit for triple damages or prosecution for criminal

liability. He seems to admit impliedly at least, that upon denial of a protest this court would have to make a judicial determination of invalidity. This is little short of complete confession by respondent of the propriety of the complaint. If an existing regulation is defective because of failure to make a finding and if such defect establishes invalidity in this court when the regulation is attacked here in a protest proceeding, I know of no reason why it should not likewise be held invalid under Section 204(e)(1). I can conceive of no justification for not declaring invalidity as of the time of the effectiveness of the amendment, lasting until the determination was made. Otherwise the Administrator might proceed to enforce the regulation in its original form, without making the determination required by the legislature. In such case Congress's mandate would become entirely meaningless.

I think this reasoning should apply to existing regulations reflecting absence of the essential finding. The amendment having been enacted in an expressed desire to meet the objection that the Price Administrator had exceeded the limitations expressed in section 2(h) of that Act in issuing certain regulations already promulgated, it would seem clear that Congress thought that previous to the amendment the Administrator had been going too far, and ordered him to desist unless and until he made a certain determination.

From and after the effective date of the amendment, complainants, as well as others in the industry, had no foreknowledge of what the Administrator might determine in this crucial respect, or indeed, whether he would ever make any determination of any character; yet the majority would require them to divine what the Administrator would do, and, if they did not foresee what was going to happen, to act at their peril with danger of subjecting themselves to criminal prosecution and a penalty of treble damages. This, I think, far beyond the intent of Congress; nor does it comport with my conception of due process of law.

[fol. 55] To illustrate the extremes to which the majority opinion would carry us, let us assume that the Administrator had not made the essential determination for a year after the Congress enacted the requirement for a determination and yet had prosecuted complainants within that period for violation of the unamended regulation. Then, under the reasoning of my brethren they could be convicted and sen-

tenced and execution of the sentence satisfied, all before the Administrator made the determination which Congress had mandatorily made essential to validity of the regulation. And if the regulation were valid for two months or three months or a year or two years without any determination it might just as logically always be valid. Under this reasoning, respondent need never make a determination, though Congress has directed him to do so.

Apparently the Administrator himself recognized the defect in his regulation resulting from the amendment and realized that he was required to make a determination, for he did so some two months after the amendment became law. But under the majority's view he need never do so. Congress accomplished nothing by the amendment, if after its passage, a regulation could be enforced without compliance with the law.

Under U. S. v. Pepper Bros., 142 F. 2d. 340 (CCA 3), a regulation may be enforced until it is declared invalid by this court. That necessarily follows from the action of Congress withholding from the enforcement courts power to pass upon validity and vesting in this court sole jurisdiction to decide invalidity. But it does not follow that when proper application is made to this court, we should refuse to declare a regulation which fails to comply with the law, invalid as of the date of the amendment.

Even though the regulation remained valid for enforcement purposes in the district court, in view of that court's *lack of jurisdiction to pass upon validity*, it seems to me that when complainants pursue the remedy which Congress has provided, it is our duty to enforce the legislative intent by declaring the regulation invalid, such invalidity reverting back to the time of the effective date of the amendment.

I would deny the motion to dismiss.

[fol. 66] [Stamp:] United States Emergency Court of Appeals. Filed Oct. 5, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 232

THOMAS PAPER STOCK COMPANY, et al.

v.

CHESTER BOWLES, Price Administrator

Present: Maris, C. J. and Lindley and Laws, JJ.

JUDGMENT

This case came on to be heard on the complaint, Respondent's motion to dismiss the complaint and memorandum in support thereof, and Complainants' objections to motion to dismiss the complaint and memorandum in support thereof, and was argued by counsel.

Upon consideration whereof it is ordered and adjudged that the complaint herein be, and it hereby is, dismissed.

It is further ordered that the clerk of this court transmit forthwith certified copies of this judgment to the Price Administrator and to the United States District Court for the Northern District of Illinois.

Dated October 5, 1945.

By the division.

Teste: Herman C. Beasley, Clerk.

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[fol. 67] UNITED STATES EMERGENCY COURT OF APPEALS

I, Herman C. Beasley, Clerk of the United States Emergency Court of Appeals, hereby certify that the foregoing printed, mimeographed, and typewritten pages, numbered from 1 to 66, both inclusive, constitute a true copy of

(1) Complaint.

(2) Respondent's motion to dismiss Complaint and memorandum in support thereof.

(3) Proceedings in the United States Emergency Court of Appeals in the case of: No. 232, Thomas Paper Stock

Company, et al., v. Chester Bowles, Price Administrator, as the same remain upon the files and records of said United States Emergency Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Emergency Court of Appeals, at the City of Washington, this 12th day of October, A. D. 1945.

Herman C. Beasley, Clerk, United States Emergency Court of Appeals, By: J. Frederick Mattingley, Chief Deputy Clerk. (Seal.)

[fol. 58] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 2, 1946

The petition herein for a writ of certiorari to the United States Emergency Court of Appeals is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.